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Sitt Tatt Berhad v Flora a/p Gnanapragasam & Anor

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW NO R1–25–08 OF 2002

B RAUS SHARIF J
20 SEPTEMBER 2005

Labour Law — Employment — Dismissal — Constructive dismissal — Sexual harassment — Failure to call evidence to rebut claims of harassment — Whether adverse
C *inference rightly invoked — Delay in raising claims of harassment — Whether harassment was breach of terms of employment — Inaction of higher management to protect employee from harassment*

D The first respondent was the employee of the applicant. She claimed she was forced to resign due to the sexual harassment by her immediate supervisor, one Sivananda Manickam. The first respondent testified that she brought the incidents of harassment to knowledge of the Senior Manager of Operation of the applicant, one Desmond Yeap and even to the Executive Director Nik Murad Nik Khamil but no
E action was taken. At the hearing before the Industrial Court, the applicant did not call Sivananda to rebut the complaints made by the first respondent. Desmond Yap and Nik Murad were also not called. The Industrial Court found that the first respondent was constructively dismissed and ordered back wages in lieu of reinstatement. The applicant applied to quash the award.

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Held, dismissing the applicant's application with costs:

(1) The Chairman of the Industrial Court had undertaken sufficient judicial appreciation of the evidence adduced before him. He chose to accept the
G evidence of the first respondent. He gave his reasons for the choice he made, thus there was no reason for this court to interfere with his findings of facts (see para 12).

(2) Section 114(g) of the Evidence Act was rightly invoked against the applicant for failure to call Sivananda, Desmond Yeap and Nik Murad (see para 14).

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(3) On the issue that there was a delay on the part of the first respondent to raise the claims of sexual harassment and the failure to lodge a police report, the first respondent did raise the issue with Desmond Yeap and the same was within the knowledge of Nik Murad. But no action was taken by both of them to protect the first respondent (see paras 15–16).

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(4) The incidents of harassment and annoyance and non-action on the part of higher management of the company to react on the complaints by the applicant constituted a breach on the implied terms of the first respondent's contract of employment. Thus the first respondent had been constructively dismissed by the applicant (see paras 17–18).

[Bahasa Malaysia summary

Responden pertama adalah pekerja pemohon. Beliau mendakwa bahawa beliau telah dipaksa untuk meletak jawatan akibat daripada gangguan seksual oleh penyelia langsungnya yang bernama Sivananda Manickam. Responden pertama memberi keterangan bahawa beliau telah memaklumkan Pengurus Senior Operasi pemohon, Desmond Yeap berkenaan perkara tersebut, dan malah juga kepada Pengarah Eksekutif, Nik Murad Nik Khamil, tetapi tiada tindakan telah diambil. Semasa pendengaran dalam Mahkamah Perusahaan, pemohon tidak memanggil Sivananda untuk menyangkal aduan yang dibuat oleh responden pertama. Desmond Yap dan Nik Murad juga tidak dipanggil. Mahkamah Perusahaan mendapati bahawa responden pertama telah dipecat secara konstruktif dan mengarahkan gaji tertunggak sebagai ganti pengembalian jawatan bekerja. Pemohon memohon untuk membatalkan award tersebut.

Diputuskan, menolak permohonan pemohon dengan kos:

(1) Pengerusi Mahkamah Perusahaan telah menjalankan penilaian penghakiman yang mencukupi bagi keterangan yang dikemukakan di hadapannya. Beliau memilih untuk menerima keterangan responden pertama. Beliau telah memberikan alasan bagi pilihannya, maka tiada sebab bagi mahkamah ini untuk campur tangan dalam penemuan faktanya (lihat perenggan 12).

(2) Seksyen 114(g) Akta Keterangan telah digunakan dengan sebetulnya terhadap pemohon atas kegagalan untuk memanggil Sivananda, Desmond Yeap dan Nik Murad (lihat perenggan 14).

(3) Berkenaan dengan isu yang menyatakan bahawa terdapat kelewatan bagi responden pertama untuk membangkitkan dakwaan gangguan seksual dan kegagalan untuk membuat laporan polis, responden pertama telah membangkitkan perkara tersebut kepada Desmond Yeap dan perkara itu juga diketahui oleh Nik Murad. Tetapi tiada tindakan yang diambil oleh kedua-dua mereka untuk melindungi responden pertama (lihat perenggan 15–16).

(4) Kejadian gangguan dan kejengkelan dan tiada tindakan yang diambil oleh pihak pengurusan lebih tinggi syarikat terhadap aduan-aduan oleh pemohon adalah merupakan perlanggaran terma-terma tersirat kontrak pekerjaan responden pertama. Oleh itu, responden pertama telah dipecat secara konstruktif oleh pemohon (lihat perenggan 17–18).]

Notes

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 849–873.

Cases referred to

MBF Unit Trust Management Berhad v Mahkamah Perusahaan Malaysia & Anor [2004] 5 MLJ 526 (refd)

Palmolive (M) Sdn Bhd v Yap Koh Foong & Anor [2001] 2 MLJ 600 (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Rules of the High Court 1980 O 53

Thavalingam Thavarajah (Zaid Ibrahim & Co) for the applicant/appellant.
Satish Nair (Satish Nair & Associates) for the respondent.

Raus Sharif J:

[1] This is an application for an order of certiorari under O 53 of the Rules of the High Court 1980 (RHC) by the applicant to quash Award No 998 of 2001 handed down by the Industrial Court on 14 December 2001. The Industrial Court found that the first respondent was constructively dismissed by the applicant and consequently the applicant was ordered to pay the first respondent back wages in lieu of reinstatement in the sum of RM48,680.00.

[2] The applicant is a company registered under the laws of Malaysia and operates from Suite 8–3, 8th Floor, Wisma Chase Perdana, Off Jalan Semantan, Damansara Heights, 50490 Kuala Lumpur. The first respondent is Flora a/p Gnanapragasam.

[3] The first respondent joined the services of the applicant as Personnel Executive in the Human Resources Department with effect from 1 October 1996. At the material time her immediate supervisor was one Sivananda Manickam (Sivananda), the Senior Manager of the Human Resources Department of the applicant.

[4] On 6 May 1998, the first respondent tendered her resignation. She claimed that she was forced to write the letter of resignation due to acts of sexual harassment by Sivananda. Hence, she claimed she was constructively dismissed by the applicant.

[5] The following are summaries of incidents of sexual harassments adduced by the first respondent before the Industrial Court:

The first incident

During a overnight trip to Penang for official purposes on 10 July 1997 and after work for that day, Sivananda had invited the first respondent to spend the night with him in his hotel room although they were already accommodated in separate rooms. This call was made very late at night when first respondent was already sleeping. Although the first respondent had declined the invitation, Sivananda had nevertheless telephoned the first respondent again requesting that she changed her mind. The first respondent refused again.

The second incident

During another trip to Penang for official purposes (recruitment drive) on 2 August 1997 Sivananda had asked the first respondent to meet up with him at the lobby of the hotel and to spend the time with him. Again the first respondent declined the request and told him off.

The third incident

On 30 December 1997, Sivananda had asked the firsts respondent to meet him at the restaurant/bar 'TGIF' in Subang Parade after office hours to discuss office matters. The first respondent refused but he insisted stating that it was very important. The first respondent then met Sivananda and during the meeting, instead of discussing office matters, it became a monologue where Sivananda talked of his hobbies, his likes and dislikes but nothing related to work. Bored with his conversation the first respondent insisted on leaving. He was upset stating that one hour was too short but he had no choice and suggested having another meeting with her on New Year's eve on 31 December 1997 at Sentul Pasar, at his friend's house. He would even arrange for a half-day off for her that day. The first respondent again declined to go.

Nothing happened after this. Work was as usual until the 19 March 1998.

The fourth incident

On 19 March 1998, Sivananda called the first respondent for discussion on her performance where he commented not only on her performance but on her dress and also her behaviors that she was rude and never smiled. Basically he said the first respondent was no good and could be put in the cold storage. He even told her that if she did not follow his style of work she could be put in the 'cold storage'. He requested her to think over for a few days but the subject was never brought up again.

The fifth incident

Sometime during mid-April 1998, Sivananda had instructed the first respondent to make another trip with him to Penang for official purposes in his car. When informed by the first respondent that she had made her own travel arrangements and would bear the expenses thereof, Sivananda had shouted at the first respondent in the presence of other colleagues saying that she cannot make travel plans on her own without his prior approval. Being an official duty she left for Penang regardless but on her own.

The sixth incident

Later after the five incidents above, at Penang the first respondent met Sivananda at the Penang office. After working the whole day, Sivananda asked about the overnight accommodation and on being informed by the first respondent that she had booked on her own Sivananda became very furious — his face was as 'black as thunder' and ordered the first respondent to go back home. The first respondent had no choice but to take the evening flight back to Kuala Lumpur. She reported to Desmond Yeap the next morning on Sivananda's treatment and attitude towards her ever since the hotel incident in 1997.

The seventh incident

On 2 May 1998, an appraisal for 1997 was conducted in respect of the first respondent by Sivananda and not only was the appraisal adverse to her but a direct contrast to the one made in the previous year. In addition the first respondent was given a list of tasks to be completed on a monthly basis for 3 months which was never assigned before.

On the following day, 3 May 1998, when the first respondent was preparing to go to the Immigration Department for official purposes, Sivananda shouted at her in the presence of other colleagues saying that she had not informed him of her plans but should have given him her plans or itinerary and not leave the office as she pleased.

[6] In her evidence the first respondent also testified that she has approached Desmond Yeap, the Senior Manager Operation of the applicant, and told him of all the incidents with regard to Sivananda but according to her Desmond Yeap did not take any step to rectify the situation. Further according to the first respondent, she was called by the Executive Director Nik Murad Nik Khamil (Nik Murad) who heard about her complaints of the sexual harassments by Sivananda, but there was no follow-up action taken by him.

[7] The first respondent also testified that Nik Murad subsequently called her for a discussion some three days after she had tendered her letter of resignation. According to her, Nik Murad promise to investigate but nothing came out from the promise. Further, according to the first respondent, sometime in mid May, Desmond Yeap arranged for an appointment to meet her to discuss about the same. They met at Petaling Jaya Hilton. According to the first respondent, instead of giving support to her plight, he asked her to sign a disclaimer of all her claims against the applicant.

[8] At the hearing before the Industrial Court the applicant did not call Sivananda to rebut the complaints made by the first respondent. Neither Desmond Yeap or Nik Murad called by the applicant.

[9] Before me, it is the submission of the applicant that the first respondent's claims that she was sexually harassed by Sivananda, should have been rejected by the Industrial Court. This is because as argued by learned counsel for the applicant that the first respondent allegations contained the following inconsistencies:

(1) The first respondent could not remember the hotel where the first and second incidents took place. If the first respondent had viewed the alleged incidents in such a grave and serious manner, she certainly would have at least recalled the name of the hotel.

(2) On the morning following of the first incident, the first respondent had in fact admitted to having breakfast with Sivananda. If the first respondent had viewed the alleged incident in such a grave and serious manner, she would not have had breakfast with Sivananda but instead, would have expressed her anger or disappointment to him, which she failed to do.

(3) In respect of the third incident, it should also be noted that the first respondent had met Sivananda at 'TGIF' in Subang Parade. She could have declined the invitation as she claimed to have done during the first and second incidents, but she chose to meet Sivananda and had actually stayed for an hour.

(4) In respect of the seventh incident, the first respondent had agreed that Sivananda was angry with her because she did not seek his approval to go to the Immigration Department and that he had every right to enquire about her whereabouts during office hours. But, the first respondent said that Sivananda should not have shouted at her. In contradiction to that, the first respondent had also testified that Sivananda is a person who is 'forever yelling', which could imply that Sivananda's manner of speech during the incident was quite normal. Suzana, the applicant's witness did also confirm during her testimony before the second respondent that Sivananda generally spoke in a loud manner.

(5) The first respondent did not complain to the management of the applicant in respect of the alleged incidents. She had only spoken to Desmond Yeap after the sixth incident, which was approximately eight months after the first incident. If the first respondent had viewed the alleged incidents in such a grave and serious manner, or had felt threatened in any way, she should have complained, or at least, spoken to the management of the applicant. This, she had failed to do.

(6) The first respondent had also testified that she did not lodge any police report against Sivananda. If the first respondent had felt threatened, she certainly would have lodged a complaint, which was not forthcoming from her.

[10] In fact, the same argument was submitted before the Industrial Court. But the Industrial Court choose to believe the first respondent, in that there was in fact several incidents of harassment and annoyance on the part of Sivananda. The learned Chairman made the following findings:-

> As regards the first incident the conduct of Sivananda is a serious misconduct of sexual harassment against the claimant the company's female single employee.
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> As regards the second incident again it is a serious misconduct of sexual harassment if not a sexual annoyance by Sivananda on his subordinate female employee.
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> As regards the third incident although it may not amount to sexual harassment it was nevertheless an unfair labour practice both having to work after office hours and subjected to annoyance.
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> As regards the fourth incident the comments by Sivananda were mischievous and annoying.
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> As regards the fifth and sixth incidents Sivananda's conduct was not only most unbecoming of a superior officer but were intended to harass and embarrass her. And the order to go back home the same evening (from Penang) was to say the least very cruel and most unreasonable order.
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> As regards the seventh incident the way the appraisal was conducted was not annoying and the shouting the following day was merely to get back on her and vent his anger for having spurned him.

[11] To me, the above findings of the learned Chairman are findings of facts based on the witnesses he saw and heard. It is trite law that findings of facts of the Industrial Court cannot be impugned in the judicial review proceedings and certiorari cannot be used as a disguise to appeal from findings of facts. Once there is evidence to support a finding of fact, the reviewing court would not interfere with it. And it is not the reviewing court's function to interfere with the sufficiency of evidence. The conclusion of finding is purely left to the Industrial Court and the reviewing court would not interfere merely because the latter might come to different conclusion (*Palmolive (M) Sdn Bhd v Yap Koh Foong & Anor* [2001] 2 MLJ 600 and *MBF Unit Trust Management Berhad v Mahkamah Perusahaan Malaysia & Anor* [2004] 5 MLJ 526).

[12] In the present case, I find that the learned Chairman has undertaken sufficient judicial appreciation of the evidence adduced before him. He chose to accept the evidence of the first respondent. He gave his reasons for the choice he made and I have no valid reasons to interfere with the findings of facts of the learned Chairman.

[13] It is clear from the award that the reasons why the learned Chairman accepted the evidence of the first respondent was because of the failure of the applicant to call Sivananda, Desmond Yeap and Nik Murad. On this issue the learned Chairman stated as foliows:

> The company sought to disprove the claim of harassments through the cross-examination of the claimant without producing the three relevant witnesses namely Sivananda, the accused, Desmond Yeap the Senior Manager Operations to whom the complains were made and also Nik Murad bin Nik Khamil, the Executive Director who interviewed the claimant in this matter. The reason for not bringing them in this hearing is that they had left the company and are not traceable. However from the statement made by the company's witness Gowmathy Dewi, COW 2 the Company Legal Officer, only little effort was made to serve them with the notice of hearing, least of all with subpoenas. Subpoenas was applied for on Desmond Yeap and Nik Murad but no attempt was made to serve on them. As regards to Sivananda no attempt at all was made to get him to come to court. In words of COW 2, 'As for Siva his address uncertain. Did not send anyone to check Siva on his last known address or home'. Thus the provision of s 114(g) of the Evidence Act can be validly invoked against the Company.

[14] I am in complete agreement with the learned Chairman. Section 114(g) of the Evidence Act was rightly invoked against the applicant.

[15] On the issue that there was a delay on the part of the first respondent to raise the claims of sexual harassment and the failure to lodge a police report, the learned Chairman addressed it in the following words:

> Does the law require the claimant in such a situation to lodge a report to the police? If it is, what there are the functions of Desmond Yeap and Nik Murad as Senior Management Officers of the company or both the claimant and Sivananda. The Court find it is not the claimant who is guilty of any dereliction but these two officers who were guilty of dereliction of their duties in not taking any remedial measures. The facts showed they had connived and condoned the acts of Sivananda.

[16] Again I am in full agreement with the learned Chairman. It is evidence that the first respondent did raise the issue with Desmond Yeap and the same was within the knowledge of Nik Murad. But no action was taken by both of them to protect the first respondent.

[17] On the issue whether the several incidents of harassments and annoyance and non-action on the part of the higher management of the company to react on the complaints by the applicant constituted a breach on the implied or/and express terms of the contract employment the learned Chairman put it in the following words:

> To my mind the single incident at the hotel in Penang on 10 July 1997 was a sufficient cause for the claimant but only if she had reported officially to the company. But wisely or

otherwise she preferred to keep quite about the incident hoping it would be a 'one-off incident'. In fact the court is pleased that the claimant did not exhibit her anger the next morning at breakfast but had carried on her official task as though nothing had transpired the previous night. Nothing exacting happened until one month later. It happened again 4 months later in December followed by another 3 months later in Mid-April. Yet another on 2 May 1998 which broke the camel's back. She wrote a letter of resignation.

[18] To me, the learned Chairman was right to conclude that there has been a breach on the implied terms of the first respondent contract of employment. It follows that the learned Chairman was also right to conclude that the first respondent had been constructively dismissed by the applicant.

[19] In conclusion, I am of the view that the Industrial Court in handing the Award No 998 of 2001 had not made a perverse finding or erred in law or acted in excess of its jurisdiction. Accordingly, the applicant's application is hereby dismissed with costs.

Applicant's application dismissed with costs.

Reported by Loo Lai Mee